No. 93-1392

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In The

Supreme Court of the United States

October Term, 1993

DOCTOR NUI LOA PRICE, AKA MAUI LOA, *individually and in the capacity of Chief of the Hou Hawaiians;* THE HOU HAWAIIANS, *a native Hawaiian Ohana; and* KAMUELA PRICE, *individually and in the capacity of member of the Elder Counsel of the Hou Hawaiians,*

Petitioners,

vs.

MOANIKEALA AKAKA; ROD BURGESS; CLARENCE CHING; FRENCHY DeSOTA; LOUIS HAO; MANU KAHALIALII; THOMAS KALUKUKUI, SR; MOSES KEALE, SR; *and* KEVIN MAHOE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. Section 5(f) of Hawaii's Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959), provides in relevant part that the money proceeds of certain lands conveyed to Hawaii upon Statehood and thereafter by the United States shall be "managed and disposed of for one or more" purposes,

including "support of the public schools and other public educational institutions"; "the betterment of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended"; "the development of farm and home ownership on as widespread a basis as possible"; "the making of public improvements"; and "the provision of lands for public use." Congress did not provide any private remedy for enforcing this provision, stating only that the use of the proceeds of these "public trust" lands "for any other object" than "one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide" "shall constitute a breach of trust for which suit may be brought by the United States." *See* 73 Stat. at 6; Pet. for Cert. at 5. "Native Hawaiians," as defined by the Hawaiian Homes Commission Act, include only those "descendant[s] of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *See* the Act of July 9, 1921, 42 Stat. 108.

2. In 1978, Hawaii's constitutional convention drafted for the voters, and the voters of Hawaii approved, amendments to the state constitution creating an office of Hawaiian Affairs (OHA) to fulfill hopes for self determination by all persons of Hawaiian, *i.e.*, indigenous, ancestry. *See* Haw. Const. Art. XII, §§ 4, 5 (1978). The task of actually assigning to OHA specified revenues, from the public land trust and other sources of public revenue, was not completed until recently. *See Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 174, 737 P.2d 446, 458, *cert. denied*, 484 U.S. 898 (1987) (holding that amount actually assigned to OHA was undefined and remained a "political question" under state law); Act

of July 3, 1990, ch. 304, 1990 Haw. Sess. L. 947 (purporting to define "manageable standards" for defining revenue).

3. In its structure and day-to-day decision making, OHA is essentially legislative in character. Under the state constitution, OHA is governed by a board of trustees "elected by qualified voters who are Hawaiians," and only "Hawaiians" may be so elected. Haw. Const. Art. XII, § 5 (1978). The board, by constitutional mandate, must be geographically diversified, with five of the nine trustee positions reserved for a "representative" from each of the five largest islands in the Hawaiian archipelago (Oahu, Kauai, Maui, Molokai, and Hawaii). *Id.* All persons of any Hawaiian ancestry may vote in all trustee elections, whether for "at-large" seats or for the "at-large island-representative" seats. Haw. Rev. Stat. § 13D-1 (1985). Trustees are elected to staggered terms (*id.* § 13D-5), and state law provides detailed oversight of trustee elections. *See id.* §§ 13D-3, 13D-4; *id.* (Supp. 1992). The board is empowered to "determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid," Haw. Rev. Stat. § 10-4, to "[m]anage, invest, and administer the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians," *id.* § 10-5(1) (1985 & Supp. 1992), and to "[f]ormulate policy relating to the affairs of native Hawaiians and Hawaiians, provided that such policy shall not diminish or limit the benefits to native Hawaiians under Article XII section 4, of the state Constitution." *Id.* § 10-5(3) (1985). As construed in *Yamasaki, supra,* Article XII, § 4 of the Hawaii Constitution provides no

judicial cognizable benefits to native Hawaiians; such benefits are defined only by the statutes of Hawaii.

4. This lawsuit was filed below on October 18, 1988, and after an initial appeal, *see Price v. Akaka*, 928 F.2d 824 (9th Cir.), *cert. denied*, 112 S. Ct. 436 (1991), was framed by the Ninth Circuit as an individual-capacity action for damages under 42 U.S.C. § 1983, by a native Hawaiian and others against the members of the board of trustees of OHA in office in 1988. The sole cause of relief pled by the Plaintiffs was that Respondents had violated § 5(f) of the Admission Act by using public trust land revenue for "purposes other than those listed in § 5(f)." 928 F.2d at 826-28. Because the case first went to the Ninth Circuit on a Rule 12(b)(6) disposition which had construed the complaint as pleading claims only under Hawaii law, the Ninth Circuit vacated and remanded for further proceedings, never addressing issues such as Respondents' various immunity from suit.

5. On remand, Respondents moved for summary judgment, asserting, *inter alia*, not only that they were absolutely and qualifiedly immune from suit, but that the summary judgment record failed to reveal a violation of Plaintiff's federal rights at all, and, indeed, that under *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992), and *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), Plaintiffs did not have standing, or, if they did, § 5 of the Admission Act was not enforceable under 42 U.S.C. § 1983.

6. The particular dispute in the District Court revolved around the so-called "single definition" issue. As noted above, the Hawaiian Homes Commission Act, and, therefore, the Admission Act, create *de jure* racial

classifications of Hawaii's native peoples based on "blood quantum." The legislative history shows that this distinction was sought primarily by non-Hawaiians as a means of limiting the potential benefits of the Hawaiian Homes Commission Act. The "blood quantum" requirement was originally opposed by every person of Hawaiian ancestry to testify upon the original 1921 federal legislation, including Delegate Kuhio. *See* Def. Exh. "O" (Clerk's Record ("CR") 29). The 1978 state constitutional convention asked OHA to determine the propriety of this way of categorizing the indigenous Hawaiian people:

> [I]n looking to the future, your Committee decided that it is of utmost importance to establish a trust entity that would be for all individuals whose ancestors were natives of the area which consisted of the Hawaiian Islands prior to 1778 . . . Although your Committee was tempted to change this outmoded rule from the 1920's [*i.e.* the qualification of blood quantum set forth in the HHCA], the Committee concluded that this responsibility should be assumed by the Office of Hawaiian Affairs.

Stand. Comm. Rep. No. 59, I *Proceedings of the Constitutional Convention of Hawaii of 1978* 643-44. This concern in turn has animated legislation affecting OHA from its inception. *See* Stand. Comm. Rep. No. 784, 1979 Haw. Sen. J. 1351-52. OHA's concern with the so-called "single definition" issue began almost immediately following its establishment, by endorsing, in 1983, elimination of the blood quantum requirement, as debated by the Native Hawaiians Study Commission, *see* 42 U.S.C. § 2991a (1982); Aff. of Linda Kawai'ono Delaney, Def. Exh. "Q" (C.R. 27). In May, 1988, OHA's trustees also proposed to

expend trust land proceeds on a plebiscite on the "single definition" issue. Def. Exh. "R" (C.R. 27). OHA's own attorney opined that such an expenditure would serve "the 'sole interests' " of native Hawaiian beneficiaries of the public land trust, as changing the definition itself could strengthen "native culture, language, and traditions that promote pride in the success of the members of the Hawaiian community," and would "unite the Hawaiian people." *See id.* OHA's attorney pointed to federal judicial precedent in the District of Hawaii, *i.e., Hoohuli v. Ariyoshi,* 631 F. Supp. 1153 (D. Haw. 1986), which had reasoned that, as a matter of economics and practical fact, the "problems of crime, inadequate housing, education, and welfare" were suffered by the Hawaiian community as a whole, and that assisting those of less than half blood would automatically rebound to the benefit of so-called "Native Hawaiians." *Id.* OHA's counsel relied on Congress's expansion of native Hawaiian benefit programs in the Native Hawaiians Study Commission Act, 42 U.S.C. § 2991a, and the Native American Programs Act of 1974, 42 U.S.C. § 2992, 2992c(3), and general principles of native American law that justify the subordination of short-term economic goals in exchange for long-term cultural and political benefits. *Id.* (citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 39 (1978)). While the Department of the Attorney General of Hawaii originally opined that "the use of funds derived from the ceded land funds to advocate a change in the law to provide for a single definition is not a use solely for the betterment of conditions of native Hawaiians," *see id.,* the Department of Attorney General, on July 28, 1988, abandoned this position, stating that "it is not improper to expend special fund

moneys to merely disclose (inform) to and gain the input of OHA's native Hawaiian beneficiaries on various matters (e.g. the single definition)." *Id.* Thereafter, referendum ballots were distributed, informing OHA voters that the dual-blood-quantum system had treaded upon "traditional Hawaiian values of identity and affection," and that "[i]n another fifteen years, more than 70% of our population will be excluded from current trust benefits." Def. Exh. "O" (C.R. 27). The ballot packet noted that native Hawaiian culture did not draw blood quantum distinctions, a fact embodied in the term "Na Oiwi" which described as "family" those "of the same bone." It stated that the dual definition was adopted by Congress over the protests of native Hawaiian witnesses and Delegate Kuhio, and was part of "the 'divide and conquer' motives of Island sugar planters." *Id.* The ballot packet also observed that congress had refused to adopt the blood quantum requirement in recent legislation, and that those of 50-percent blood would continue to receive preferences, if the definition were changed as OHA proposed, based on need, and that, in any case, only the Legislature (or Congress, with respect to the unique benefits of the Hawaiian Homes Commission Act), could alter the requirement. *Id.* Of those who participated in the referendum, at least 66 percent of native Hawaiians supported a "single definition." Aff. of K. Brian Doty; Def. Exh. "N" (C.R. 27). As early as December 23, 1988, in a related state court suit styled *Kepoo v. Burgess*, No. 88-2987-09 (Haw. 1st Cir. summary judgment entered 1989), *aff'd mem.*, No. 14770 (Haw. June 24, 1991), a Hawaii state trial court had already denied preliminary relief to block the referendum, stating:

> 7. The evidence did not show that the actions of Defendants in posing the issue of the Single Definition would dissolve the Public Land Trust, would diminish or limit the benefits of native Hawaiians, or would not be for the betterment of conditions of native Hawaiians.
>
> 8. The evidence did not show that the actions of the Defendants in distributing ballots on the referendum would dissolve the Public Land Trust, would diminish or limit the benefits of native Hawaiians, or would not be for the betterment of conditions of native Hawaiians.

Def. Exh. "P" (C.R. 27). Hawaii Circuit Judge Milks reasoned that "[t]he betterment of the conditions of native Hawaiians can be achieved in many ways," and that "[p]rograms such as the Single Definition Referendum that promote self-determination [are] one of many ways to achieve the betterment of the conditions of native Hawaiians even though all Hawaiians would benefit." *Id.* She found, further, that the dual definition was properly found by Respondents to have been, and to remain, " 'contrary to Native Hawaiian culture and tradition and was a requirement developed and approved by those with no native Hawaiian blood.' " *Id.* A second Circuit Judge, and now Associate Justice of the Supreme Court of Hawaii, granted summary judgment for Respondents in the *Kepoo* action, and the Hawaii Supreme Court summarily affirmed that judgment.

7. In the federal suit underlying the instant petition, United States District Judge David Ezra denied Respondents' motion for summary judgment, and Respondents immediately appealed under the collateral order doctrine, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985), the denial at the

summary judgment stage of their claims of absolute and qualified immunity from suit under 42 U.S.C. § 1983. *See* Pet. App. "A." The Ninth Circuit reversed the denial of qualified immunity, finding first that this Court's decision in *Lujan v. Defenders of Wildlife* did not alter Petitioners' standing, and that this Court's decision in *Suter v. Artist M.* did not affect Petitioners' ability to sue under 42 U.S.C. § 1983. *See* Pet. App. 6a-12a. The Ninth Circuit rejected Judge Exra's reliance on certain aspects of state Attorney General opinions as establishing "clear law" on the alleged federal duties at issue, and pointed to such authorities as Judge King's ruling in *Hoohuli v. Ariyoshi, supra,* Judge Milks' analysis in *Kepoo v. Burgess, supra,* and the report of the state constitutional convention, as ousting any claim for damages. Thus, the Court of Appeals held, "[t]he OHA trustees reasonably believed that a referendum to determine Hawaiian opinion on the proper definition of 'native Hawaiian' was for the 'betterment of the conditions of native Hawaiians' as presently defined." Pet. App. 40a.

REASONS FOR DENYING THE WRIT

1. The Ninth Circuit's disposition below constitutes an absolutely correct application of the doctrine of qualified immunity, and presents no question warranting this Court's further review in this regard. Indeed, this is true several times over, in that, in addition to the grounds relied upon by the Court of Appeals, it was unclear, during the years at issue, whether a "disposition" to OHA was terminated all federal supervision over the public trust land funds at issue, and, in any event,

whether OHA's actions, even if violative of OHA's state law duty to its Native Hawaiian beneficiaries, could still be justified with regard to any federal duties on the basis of the "public use" clause of § 5(f) of the Admission Act. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242-43 (1984). As this Court emphasized only days ago, qualified immunity is not "defeated where a defendant violates *any* clearly established duty, including one under state law," but, rather, only when a "clearly established . . . federal right" is implicated. *Elder v. Holloway*, 62 U.S.L.W. 4149, 4151 (U.S. Feb. 23, 1994). Insofar as the Ninth Circuit's decision relies on Judge Milks' post-election findings in *Kepoo*, this Court has also found such post-act decisions potentially "relevant" to immunity analysis. *See Caspari v. Bohlen*, 62 U.S.L.W. 4113, 4117 (U.S. Feb. 23, 1994) (immunity of state court judgments in federal habeas review). No serious attack on the Ninth Circuit's judgment is raised by the Petition, which devotes most of its pages to discussion of matter not properly raised anywhere in the courts below.

2. If there were any basis for reviewing the qualified immunity determination of the Court of Appeals, the Court would likely affirm in any event on the grounds of absolute immunity. *See Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 403-04 (1979). Absolute legislative immunity "is equally applicable to federal, state, and regional legislators," *id.* at 405, and the immunity applies even to officers of the executive or judicial branches of state or local government "when acting in their legislative capacity." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734 (1980). Here, Respondents were, insofar as Petitioners questioned their activities in the

District Court, seeking, in a fundamental way, to communicate with their constituents. Certainly Congress does not forfeit its immunity in enacting spending bills to pay for committee hearings, investigations, and the like, and Petitioners have no good claim for relief under 42 U.S.C. § 1983 for this reason.

3. Respondents' position before the Court of Appeals was that that court had no jurisdiction under the collateral order doctrine to consider the question of Article III standing, or the ability to sue under 42 U.S.C. § 1983. *See Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 500 (1989). Because the Ninth Circuit correctly resolved the immunity issue, and its view of the other issues in the case may properly be viewed as *dicta*, we see no reason to grant review to address the propriety of the Ninth Circuit's construction of this Court's decisions in *Lujan* or *Suter*. Moreover, if the Court were to agree with the Court of Appeals that the issues of standing and ability to invoke § 1983 were necessary to resolving the qualified immunity and absolute immunity issues in this case, that complication would militate against, rather than for, granting review here, as those issues themselves are independently important and having prompted a division of opinion, if the Ninth Circuit's ruling here is law of the circuit (particularly with respect to the impact of *Suter*), with other courts of appeals. *See Resident Council of Allen Parkway Village v. HUD*, 980 F.2d 1043, 1051 (5th Cir. 1993); *Stowell v. Ives*, 976 F.2d 65, 68 (1st Cir. 1992). There is thus no basis for granting review here.

CONCLUSION

For the reasons above, certiorari should be denied.

Dated: Honolulu, Hawaii, March 2, 1994.

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